Supreme Court, U.S.
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NO. 92-1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CRAYTON K. TURNER AND
DONNA TILLMAN TURNER,
Plaintiffs-Applicants

AND

CIGNA INSURANCE COMPANIES,
Respondent

Versus

OCEAN NYMPH SHIPPING CO., LTD.
AND COLUMBIA SHIP MANAGEMENT, LTD.,
Defendants-Respondents

BRIEF OF RESPONDENT CIGNA INSURANCE COMPANIES TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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76 pp

QUESTION PRESENTED FOR REVIEW

Respondent, CIGNA Insurance Companies, adopts by reference the Questions Presented for Review set forth in the Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit filed by Crayton K. Turner and Donna Tillman Turner, plaintiffs-applicants, on December 1, 1992.

LIST OF PARTIES

1. Crayton K. Turner, applicant.
2. Donna Tillman Turner, applicant.
3. Harold M. Wheelahan, III and Dawn Adams Wheelahan, attorneys for plaintiffs-applicants.
4. Coastal Cargo, Inc., applicant's employer.
5. CIGNA Insurance Companies, intervenor-applicant.
6. Peter L. Hilbert, Jr., Kathleen K. Charvet, and McGlinchey Stafford Lang, a Law Corporation, attorneys for CIGNA Insurance Companies.

7. Ocean Nymph Shipping Co., Ltd., defendant-respondent.

8. Columbia Shipmanagement, Ltd., defendant-respondent.

9. Robert H. Murphy, and the law firm of Murphy, Williams, Rogers & Sloss, counsel for respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW . i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

REFERENCE TO OPINIONS 2

GROUNDS ON WHICH JURISDICTION IS INVOKED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

1. Course of Proceedings and Disposition in the Court Below 3

2. Statement of Facts . . 5

BASIS OF FEDERAL JURISDICTION . . 2

ARGUMENT 5

CONCLUSIONS 6

PROOF OF SERVICE 7

TABLE OF CONTENTS (continued)

APPENDICES:

Appendix A - Judgment Dismissing Intervenor's Petition A-1

Appendix B - Minute Entry dated September 3, 1992 . . . . . A-3

Appendix C - Minute Entry dated October 1, 1992 A-7

Appendix D - Order from U.S. Court of Appeals 5th Circuit, affirming District Court decision A-9

Appendix E - Motion for Summary Judgment . . . A-11

Appendix F - Memorandum in Support of Motion for Summary Judgment . . . A-13

Appendix G - Uncontested Material Facts filed by defendants . . A-25

Appendix H - Memorandum in Opposition to Motion for Summary Judgment . . . A-31

Appendix I - Plaintiff's Response to Defendant's Statement of

Allegedly Uncontested Material Facts A-38

Appendix J - Verbatim Text of 33 U.S.C.A. 905(b) A-45

Appendix K - Intervenor's Memorandum in Opposition to Motion for Summary Judgment . . . A-47

Appendix L - Intervenor's Statement of Contested Facts A-56

TABLE OF AUTHORITIES

Respondent, CIGNA Insurance Companies, adopts the Authorities set forth in the Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit filed by the plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, which appears at page v thereof.

NO. 92-1027

IN THE

SUPREME COURT OF THE UNITED STATES

CRAYTON K. TURNER AND
DONNA TILLMAN TURNER,
Plaintiffs-Applicants

AND

CIGNA INSURANCE COMPANIES,
Respondent

Versus

OCEAN NYMPH SHIPPING CO., LTD.
AND COLUMBIA SHIP MANAGEMENT, LTD.,
Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF CIGNA INSURANCE COMPANIES TO PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS

Respondent, CIGNA Insurance Companies, respectfully prays that a Writ of Certiorari issue to review the following judgments and opinions:

1. Judgment dated September 3, 1992 granting defendants' Motion for Summary Judgment and dismissing plaintiffs' and intervenor's claims with prejudice;

2. Minute Entry dated September 3, 1992, giving reasons for judgment;

3. Minute Entry dated October 1, 1991 denying plaintiffs' and intervenor's Motion for a New Trial or, Alternatively, for Relief from Judgment; and

4. The September 3, 1992 opinion by the United States Court of Appeals, Fifth Circuit.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment to be reviewed is an opinion by the United States Court of Appeals, Fifth Circuit, rendered September 3, 1992.

2. This Court has jurisdiction pursuant to 28 U.S.C. §1254. This Petition is timely filed pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

Respondent, CIGNA Insurance Companies, hereby adopts by reference the "Statutes Involved" portion of the Petition for Writ of Certiorari filed by plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, appearing at page 2 thereof.

STATEMENT OF THE CASE

(1) Nature of the case and course of proceedings and disposition below.

The original Complaint for Damages of the plaintiffs, Crayton K. Turner and Donna Tillman Turner, was filed in the United States District Court for the Eastern District of Louisiana on February 28, 1990. CIGNA Insurance Companies filed its Petition for Intervention on June 5, 1990 in order to assert its lien for workers' compensation benefits and medical benefits paid to or on behalf of Crayton K. Turner.

The owners and operators of the M/V SUCRE, Ocean Nymph Shipping Company, Ltd. and Columbia Shipmanagement, Ltd. ("the vessel")

filed a Motion for Summary Judgment claiming that no genuine issues of material fact existed and that the plaintiffs' claim pursuant to Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq., must fail because no evidence of vessel negligence existed. Plaintiffs responded, contending that multiple disputed issues of material fact exist and that the Motion for Summary Judgment should be denied. Intervenor also filed an opposition to the vessel's motion. The Trial Court granted the vessel's motion dismissing both the plaintiffs' and the intervenor's claims with prejudice. Plaintiffs and Intervenor appealed the Trial

Court's ruling to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the Trial Court.

(2) Statement of Facts.

Respondent, CIGNA Insurance Companies, hereby adopts by reference the "Statement of Facts" of the Petition for Writ of Certiorari filed by plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, appearing at pages 3-4 thereof.

ARGUMENT

Respondent, CIGNA Insurance Companies, hereby adopts by reference the "Argument" of the Petition for Writ of Certiorari filed by plaintiffs-applicants, Crayton K. Turner and Donna Tillman

Turner, appearing at pages 5-11 thereof.

CONCLUSION

Respondent, CIGNA Insurance Companies, files this Petition for Writ of Certiorari to preserve its right of recovery of compensation benefits and medical benefits paid by CIGNA Insurance Companies pursuant to the provisions of the LHWCA to or on behalf of plaintiffs-applicants, Crayton K. Turner and Donna Tillman Turner, as a result of the injuries sustained by Crayton K. Turner on January 21, 1990 aboard the M/V SUCRE.

Respectfully submitted,

PETER L. HILBERT, JR.
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McGLINCHEY STAFFORD LANG,
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643 Magazine Street
New Orleans, LA 70130
Attorneys for CIGNA
Insurance Companies,
Respondent

PROOF OF SERVICE

I, Peter L. Hilbert, Jr., attorney for Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Brief of Respondent on:

Mr. Harold M. Wheelahan, III
Ms. Dawn A. Wheelahan
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Attorneys for Defendant-Respondent

by mailing three copies thereof, postage prepaid and addressed to

their respective offices, this 23rd day of December, 1992.

PETER L. HILBERT, JR.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, ET AL — CIVIL ACTION

VERSUS — NO. 90-0727

OCEAN NYMPH SHIPPING CO., ET AL — SECTION "J"

JUDGMENT

Considering the Court's Minute Entry of September 3, 1991,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that there is judgment against the plaintiffs (Donna Tillman Turner and Crayton K. Turner) and in favor of the defendants (Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited), dismissed the plaintiffs' complaint with prejudice at the plaintiffs' costs.

IT IS HEREBY FURTHER, ADJUDGED, ORDERED, AND DECREED that there is judgment against the intervenor (CIGNA Insurance Companies) and in favor of the plaintiffs and the defendants, dismissing the intervenor's petition with prejudice at its costs.

New Orleans, Louisiana, this 3rd day of September, 1991.

/s/ PATRICK E. CARR
UNITED STATES DISTRICT COURT

DATE OF ENTRY SEPTEMBER 4, 1991

APPENDIX B

MINUTE ENTRY
September 3, 1991
CARR, J.

DONNA TILLMAN TURNER, ET AL — CIVIL ACTION

VERSUS — NO. 90-0727

OCEAN NYMPH SHIPPING CO., ET AL — SECTION "J"

This civil action is before the Court on the defendants' motion for summary judgment [Record Document No. 48].

Determining that oral argument is not needed, the Court **CANCELED** the hearing on the motion, previously set for August 28, 1991. The Court now **GRANTS** the motion.

The Court need not determine whether the defendant's expert report shows "scientific proof" that the longshoremen's testimony (that the oil was present when they took over control of the vessel for unloading the cargo containers) is "physically impossible." Even assuming that the oil was present from the beginning and not from the stevedore's end loader, the defendants are entitled to summary judgment under Scindia.

DATE OF ENTRY SEPTEMBER 4, 1991

As the longshoremen's testimony shows, the patch of oil was plainly visible to them during the daylight hours when they were first unloading the container. In these circumstances, "Scindia entitles the shipowner to rely on an 'expert and experience stevedore' acting with 'reasonable care'" would correct or warn about the hazard.

Morris v. Compagnie Maritime des Chargeurs Reunis, S.A., 832 F.2d 67, 71 (5th Cir. 1987). Thus, in order to hold the shipowner liable, the plaintiff must also prove that "circumstances made safer alternatives unduly impractical or time-consuming." Ibid. The plaintiffs have presented no such evidence, nor have they presented any evidence that the stevedore was under any special time constraint; indeed, the defendants have presented evidence that at least two safer alternatives to jumping, or stepping, across container tops existed (climbing down one container and then up the other, or using a platform or ladder between the two container tops) and that oil spills are easily cleaned up such as with sand or sawdust.

There is no basis for finding that Scindia's second category may apply here inasmuch as there is no evidence that the shipowner was exercising any control over either the cargo containers or the vessel

cranes (or over any other portion of the ship) at any time during the stevedore's operations.

Finally, there is no basis for finding that Scindia's third category may apply here. Not only is there no evidence that the shipowner had actual knowledge about the oil spill on this one container at any time whatsoever, but also there is no evidence that it had actual knowledge that the stevedore would not correct the hazard and thus was acting with "obvious imprudence" toward the safety of its longshoremen.

The cases cited by the plaintiffs and the intervenor are all distinguishable: either the hazard was preexisting and hidden, see Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 166-67 (5th Cir. 1990), or no reasonable alternative existed, see id.; Gay v. Barge 266, 915 F.2d 1007, 1011-12 (5th Cir. 1990), or the vessel owner knew about the hazard and saw the stevedore continuing to operate without correcting the hazard, see id.; Randolph v. Laeisz, 896 F.2d 964, 970 (5th Cir. 1990); Hernandez v. M/V Rajaan, 841 F.2d 582, 586 (5th Cir. 1988).

In sum, "[b]ecause the shipowner has no duty to anticipate the actions or inaction of a careless stevedore" and "east steps [by the stevedore] . . . would have

avoided the obvious danger presented" either by the oil spill or by jumping or stepping across container tops, see Morris, 832 F.2d at 71, the defendants here cannot be held responsible for the plaintiff's fall.

/s/ Illegible

APPENDIX C

MINUTE ENTRY
October 1, 1991
CARR, J.

DONNA TILLMAN TURNER, ET AL	CIVIL ACTION
VERSUS	NO. 90-0727
OCEAN NYMPH SHIPPING CO., ET AL	SECTION "J"

This matter is before the court on plaintiff's and intervenor's Motion for New Trial or alternatively For Relief From Judgment [Record Document No. 63]. The Court has determined in its discretion that oral argument is unnecessary. As such, the Court now **CANCELS** the hearing previously scheduled for October 2, 1991.

Upon reconsideration, the Court's ruling of September 3, 1991, still stands. The plaintiffs and intervenor has failed to set forth any basis for finding the defendant liable under the rational of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed 2d 1 (1981) and Morris v. Compagnie Maritime des Chargeurs Reunis, S.A>, 832 F.2d 67 (5th Cir. 1987). (See Minute Entry dated September 3, 1991.) Accordingly,

plaintiffs and intervenor's motion is **DENIED.**

DATE OF ENTRY OCTOBER 01, 1991

APPENDIX D

IN THE UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3878

DONNA TILLMAN TURNER,
wife of/and CRAYTON K. TURNER
Plaintiffs-Appellants,

and

CIGNA INSURANCE COMPANIES,
Intervenor-Plaintiff-
Appellant,

versus

OCEAN NYMPH SHIPPING CO., LTD., ET AL
Defendants-Appellees

Appeals from the United States
District Court for the Eastern
District of Louisiana

(CA 90 727 J)

Before REAVLEY, HIGGINBOTHAM, and DUHE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, WIFE OF/AND CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
VERSUS	SECTION "J"
OCEAN NYMPH SHIPPING CO., LTD. AND COLUMBIA SHIPMANAGEMENT LIMITED	

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come Ocean Nymph Shipping Co. Ltd. and Columbia Shipmanagement Limited and respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment, dismissing plaintiff's claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., for the reasons more fully set forth in the accompanying Memorandum.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ LAWRENCE R. PLUNKETT, JR.

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and Columbia Shipmanagement
Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to all counsel of record b y placing a copy of same in the United States Mail, postage prepaid, this 30th day of July, 1991.

/s/ LAWRENCE R. PLUNKETT, JR.

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, WIFE OF/AND CRAYTON K. TURNER	CIVIL ACTION
	NO. 90-0727
	SECTION "J"
VERSUS	
OCEAN NYMPH SHIPPING CO., LTD. AND COLUMBIA SHIPMANAGEMENT LIMITED	MAG. DIV. (2)

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This action arises under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA, 33 U.S.C. §905(b), as a result of an accident involving longshoreman Crayton K. Turner, which occurred aboard the M/V SUCRE on 21 January 1990. Plaintiffs, Donna and Crayton Turner, brought suit against Ocean Nymph Shipping Co., Ltd. (hereinafter Ocean Nymph), the operator of the M/V SUCRE, and Columbia Shipmanagement Limited (hereinafter Columbia), the owner of the M/V SUCRE, for injuries sustained by Crayton K. Turner on 21 January 1990. The trial of this

matter is scheduled to begin on 23 September 1991.

Defendants, Ocean Nymph and Columbia, now move this Honorable Court for a summary judgment, dismissing plaintiffs' claims against them. There are no genuine issues of material facts relevant to this motion and, considering the facts herein, plaintiffs' 33 U.S.C. §905(b) claims fail because there is no evidence of vessel negligence. Accordingly, Ocean Nymph and Columbia are entitled to a dismissal as a matter of law.

FACTS

The M/V SUCRE is an ocean-going, general cargo vessel which was owned by Columbia in January 1990. The M/V SUCRE was designed to accommodate containerized cargo. Part of the design allows the stowage of a 20 foot container awthartship, on a four-legged pedestal, just aft of the vessel's Nos. 1 and 2 pedestal crane, and just forward of the No. 2 hold. This is known as stowage position "EP-41". When a 20 foot container is placed on the pedestal, the container is level with the first tier of containers stowed on the top of the No. 2 hold. With containers stowed in this configuration, there is a space four feet, nine inches (4'09") between the 20 foot container stowed in position EP-41 and the containers atop the No. 2

hold. It is this space that plaintiff was trying to jump when he fell and was injured.

The M/V SUCRE arrived in New Orleans on 21 January 1990, berthing at Poland Avenue Wharf, at 1418 hours. The vessel had previously loaded containerized cargo in Miami, Florida. The vessel's charterers arranged for Coastal Cargo Company, a New Orleans stevedore, to discharge part of the containers, load additional containers, and restow certain of the discharged containers.

Upon the vessel's arrival at Poland Avenue Wharf, Edward Stettinius, General Superintendent for Coastal Cargo Company, boarded the M/V SUCRE and inspected the vessel prior to beginning cargo operations. (Stettinius deposition at pp. 74-75).[1] According to Stettinius, Coastal Cargo's normal procedure is for a superintendent to board and inspect a vessel prior to beginning cargo operations. However, such an inspection does not extend to inspecting the tops of containers. (Stettinius deposition at pp. 59-60). Stettinius further testified that the responsibility for identifying potentially

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[1] Stettinius testified as the corporate representative of Coastal Cargo at the 30(b)(6) deposition of Coastal Cargo.

hazardous conditions is placed on Coastal Cargo's longshoremen. If a potentially hazardous condition is discovered during operations, the longshoreman is required to notify his foreman or the superintendent. (Stettinius deposition at pp. 38, 55). If the condition exists aboard the vessel, the superintendent will notify the vessel's crew and request the crew to remedy the situation. If the situation exists on the wharf, Coastal Cargo will remedy the condition. (Stettinius deposition at p. 56). In either case, Coastal Cargo maintains equipment and supplies to clean up or otherwise remedy accumulations of oil, slippery substances and other hazards. (Stettinius deposition at p. 52). On this particular occasion, Stettinius boarded and inspected the M/V SUCRE, and satisfied himself that Coastal Cargo could carry out its discharge operations without any problem. (Stettinius deposition at pp. 79, 84). During the entire cargo operations, there were no complaints regarding vessel conditions made either to a Coastal Cargo superintendent, or the vessel's crew. (Stettinius deposition at pp. 137-138, 166-167, 169). Specifically, no complaints were made regarding any oil or foreign substance on the container tops. (Stettinius deposition at p. 156-157; Booker deposition at p. 34; Falgoust deposition at p. 26).

Discharge operations began at 1430 hours on 21 January 1990. As indicated above, certain containers were discharged from the M/V SUCRE, and set aside to be restowed aboard the vessel at a later time. One of the containers designated for restow was Container No. INNU 2109086 (hereinafter designated "the 20 foot container"). On the voyage from Miami to New Orleans, this container was stowed in Bay 5, Space 82.04. This means the container was stowed on top of the No. 2 hold, third container from the port side and was the only container in the tier. This container was discharged sometime prior to the evening meal break at 1800 hours on 21 January 1990 (Harang deposition at p. 27), and restowed between 2150 hours and 2320 hours. (Stettinius deposition at p. 135). This container was restowed in the EP-41 position.

Discharge was uneventful until 2320 hours when plaintiff attempted to jump the four foot nine inch (4'09") space between "the 20 foot container" stowed in the EP-41 position and the row of containers atop the No. 2 hold. Plaintiff fell between the wharf and the vessel, eventually landing on a piling below the wharf. He was thereafter evacuated to Charity Hospital for treatment.

Defendants submit the sole cause of plaintiff's accident was his own negligence, in jumping

between container tops, a known unsafe practice. (Booker deposition at p. 43; Falgoust deposition at p. 33; Stettinius deposition at pp. 39-44). Plaintiff's own testimony is that he considered it unsafe to jump a distance greater than four feet, even though he had done so in the past. (C. Turner deposition at pp. 63-64).[2] Here, plaintiff was attempting to jump four feet nine inches (4'09"). Plaintiff testified the proper method of getting from the top of one container to another, when a distance of four feet or more separated the two containers was to climb down a ladder from the first container, and up the ladder to the second container. (C. Turner deposition at p. 63). The other longshoremen agree that the safest method of moving from container top to container top is to climb down and then climb back up. (Falgoust deposition at pp. 21-22; Harang deposition at p. 30). Coastal Cargo General Superintendent Stettinius also testified that climbing down and back up was one of the approved means to move from container to

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[2] Plaintiff later charges his testimony saying he would consider it unsafe to jump a distance greater than 3 1/2 feet. (C. Turner deposition at pp. 65-67).

container. (Stettinius deposition at pp. 39-40).[3]

There was no reason for plaintiff to be in any hurry to move from "the 20 foot container" at position EP-41 to the other row of containers atop the No. 2 hold, because no cargo operations were underway while the vessel's crane was being rerigged to accommodate a different size container. (Booker deposition at p. 15; Falgoust deposition at p. 18; Harang deposition at p. 14, Stettinius deposition at p. 134). There was absolutely no reason that plaintiff could not have utilized one of the approved methods for moving from container top to container top.

The uncontroverted evidence is that plaintiff routinely disregarded his employer's safety rules and jumped between containers, (C. Turner deposition at p. 62-65; Booker deposition at pp. 43-44; Falgoust deposition at p. 20; Harang deposition at pp. 30-31; Stettinius deposition at p. 47), even after being told by Coastal Cargo supervisors not to jump. (Booker deposition at pp. 43-45). Defendants submit that regardless of the condition of "the 20 foot container" top, the sole cause of

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[3] The other approved method is to lay a ladder across the gap and crawl across.

plaintiff's accident was his intentional disregard of safety rules and disregard for his own safety.

Plaintiff, however, contends that it was not jumping from container to container that caused his injury, but rather oil on the top of the container which caused him to slip. Defendants submit that even if the oil on top of the container played some role in plaintiff's fall, defendants still bear no responsibility for the accident. While plaintiff contends the oil originated from the vessel's Nos. 1 and 2 pedestal crane, and Coastal Cargo's Calmar top end loader (hereinafter "top end loader") proves the source of the container top oil was <u>not</u> the vessel's cranes, but rather, Coastal Cargo's top end loader.

Plaintiff claims that be because he suffered a head injury in the fall, his own recollection of the facts of the incident are very confused. (C.Turner deposition at pp. 92-99). Plaintiff's recollection regarding the day of his accident are confused due to the "visions" of his accident he claims to suffer. Plaintiff is unable to differentiate what he actually remembers happening and what he "sees" happening in his "visions." Therefore, the testimony of the other longshoremen witnesses becomes very important. The other

longshoremen all testified that there was oil on top of "the 20 foot container", and no other containers, when "the 20 foot container" was originally discharged. (Booker deposition at pp. 29, 38-39; Falgoust deposition at p. 25; Harang deposition at p. 21). The oil on top of "the 20 foot container" was easily seen. (Booker deposition at p. 29; Falgoust deposition at pp. 35-36; Harang deposition at p. 44).

Even though the longshoremen allege they saw the oil prior to the initial discharge, they did not report it to the superintendent. (Booker deposition at p. 34; Falgoust deposition at p. 26; Stettinius deposition at pp. 137-138). According to Coastal Cargo policy, the oil should have been reported by the longshoremen. (Stettinius deposition at pp. 156-157).

Defendants submit that the scientific evidence in this case will disprove the longshoremen's version of the facts. The day after plaintiff's accident, defendants obtained samples of the oil from the top of "the 20 foot container", the vessel's Nos. 1 and 2 pedestal crane, and the top end loader, owned and operated by Coastal Cargo. Later a second sample was obtained from the top end loader. The results of the scientific analysis by Spectrochem of the samples show

conclusively that the oil on "the 20 foot container" came from the top end loader and not the vessel's crane. Both specimens from the top end loader are similar to the sample from "the 20 foot container," while the sample from the vessel's crane is different. (See report of Spectrochem, attached hereto as Exhibit "A".)

Thus, the oil could not have been on "the 20 foot container" until after the container was discharged initially by Coastal Cargo. Defendants submit that oil leaded onto the top of "the 20 foot container" while located on the wharf. Coastal Cargo's top end loader constantly leaks oil and needs repairs to its hydraulic system, (Stettinius deposition at p. 114; Booker deposition at p. 39), and has in fact leaked oil onto container tops in the past. (Booker deposition at p. 41). The top end loader is occasionally used to move 20 foot containers, (Booker deposition at p. 50), and it is occasionally left with its spreader bars parked over containers. (Stettinius deposition at pp. 119-120). Thus, defendant maintains the oil leaked from the Coastal Cargo top end loader after "the 20 foot container" had been discharged and before it was reloaded onto the vessel.

Defendants submit that there are three possible factual scenarios for when the oil was first present on "the 20 foot container": Scenario 1, that the oil was present prior to Coastal Cargo beginning its operations; Scenario 2, that the oil accumulated after initial discharge, but prior to being restowed and originated from the top end loader; and, Scenario 3, that the oil was not present at the time the vessel was inspected, but accumulated during cargo operations and originated from the vessel's gear.[4] Defendants are entitled to Summary Judgment as a matter of law under any and all of the three scenarios.

ARGUMENT

Defendants, Ocean Nymph and Columbia, maintain there is no vessel negligence under any of the factual scenarios presented in this case and, accordingly, they are entitled to summary judgment, dismissing plaintiff's claims as a matter of law.

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[4]Defendants submit that Scenario No. 3 is highly unlikely, given the uncontroverted scientific evidence in this case, but, nevertheless, defendants will analyze it as a possibility for the sake of completeness.

There is no question that plaintiff is a covered employee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. Under § 905(b) of the Act, plaintiff solely has a cause of action against the vessel for injuries sustained as a result of the vessel's negligence.

This section of the Act, in pertinent part, provides:

> If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted, if the action was caused by the negligence of persons engaged in . . .

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
VERSUS	SECTION "J"
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIP-MANAGEMENT LIMITED	MAG. DIV. (2)

UNCONTESTED MATERIAL FACTS

NOW INTO COURT, through undersigned counsel, come defendants Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement Limited, and solely for the purposes of the accompanying Motion for Summary Judgment, and pursuant to Local Rule 2.09, submits the following Statement of Uncontested Material Facts.

1. The M/V SUCRE was a general cargo vessel owned by Columbia Shipmanagement Limited and operated by Ocean Nymph Shipping Co., Ltd. on 21 January 1990.

2. Coastal Cargo Company contracted with the charterers of the M/V SUCRE to provide stevedoring services to the M/V SUCRE at the Poland Avenue Wharf during January 1990.

3. Crayton K. Turner was employed by Coastal Cargo Company as a longshoreman.

4. Crayton K. Turner was assigned by Coastal Cargo Company to act as a longshoreman during cargo operations aboard the M/V SUCRE.

5. Edward Stettinius, General Superintendent at Coastal Cargo Company, acted as superintendent during cargo operations conducted aboard the M/V SUCRE on 21 January 1990 and 22 January 1990. (Stettinius deposition at pp. 74-75).

6. Edward Stettinius, as acting superintendent, inspected the M/V SUCRE prior to Coastal Cargo beginning cargo operations. (Stettinius deposition at pp. 74-75).

7. Coastal Cargo's pre-cargo operations inspection policy does not require inspection of the tops of containers aboard vessels. (Stettinius deposition at pp. 59-60).

8. Edward Stettinius, as acting superintendent, satisfied himself following inspection of the M/V SUCRE that Coastal Cargo could conduct cargo operations with reasonable safety. (Stettinius deposition at pp. 79-84).

9. Neither Coastal Cargo nor any of its employees made any complaints to the crew of the M/V SUCRE regarding the condition of the vessel or its gear during cargo operations conducted on 21 January 1990. (stettinius deposition at pp. 137-138, 166-169).

10. Neither Coastal Cargo nor its employees made any complaints to the crew of the M/V SUCRE regarding oil on the tops of any containers. (Stettinius deposition at pp. 156-157; Booker deposition at p. 34; Falgoust deposition at p. 26).

11. Plaintiff fell while jumping from a 20 foot container located at stowage position EP-41 to the first tier of containers located above the No. 2 hold.

12. The oil on top of the container located at stowage position EP-41 was easily seen by all longshoremen. (Booker deposition at p. 29; Falgoust

deposition at pp. 35-36; Harang deposition at p. 44).

13. The Coastal Cargo longshoremen took no affirmative action to either report the oil on top of the containers or to remedy the only condition. (Booker deposition at p. 34; Falgoust deposition at p. 26; Stettinius deposition at pp. 137-138).

14. Coastal Cargo Company's policy requires that longshoremen report any hazardous conditions to their superintendent. (Stettinius deposition at pp. 38, 55, 156-157).

15. Coastal Cargo maintains equipment and supplies to clean up, or otherwise remedy accumulations of oil or other slippery hazards. (Stettinius deposition at p. 52).

16. Plaintiff considered it to be unsafe to jump between containers if the distance exceeded 3 1/2 to 4 feet. (C. Turner deposition at pp. 63-64, 64-67).

17. Plaintiff had previously been warned not to jump from container to container. (Booker deposition at pp. 43-45).

18. No cargo operations were proceeding at the time of plaintiff's accident. (Booker deposition at p. 15; Falgoust deposition at p. 18; Harang deposition at p. 14; Stettinius deposition at p. 134).

19. The oil on top of "the 20 foot container" did not come from the vessel's Nos. 1 and 2 pedestal cranes.

20. The oil on top of "the 20 foot container" came from Calmor top end loader, owned and operated by Coastal Cargo.

21. Coastal Cargo's policy is that jumping from container top to container top is an unsafe act. (Stettinius deposition at pp. 39-44; Booker deposition at pp. 43-45).

22. Coastal Cargo's policy is that the safe method of moving from container top to container top is to climb down a ladder and then climb back up or to lay a ladder down between the containers and crawl across (Stettinius deposition at pp. 39-40).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

/s/ Lawrence R. Plunkett, Jr.
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Attorneys for Defendants,
Ocean Nymph Shipping Co., Ltd.
and Columbia Shipmanagement
Limited

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the United States Mail, postage prepaid, this 30th day of July, 1991.

/s/ Lawrence R. Plunkett, Jr.

APPENDIX H

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Aug. 20, 1991

DONNA TILLMAN TURNER wife of/and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727
VERSUS	SECTION "J"
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT	JUDGE CARR MAGISTRATE WYNNE

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

MAY IT PLEASE THE COURT:

This claim arises out of a January 21, 1990 accident in which plaintiff, Crayton Turner, slipped and fell from a container aboard the defendant's vessel, the M/V SUCRE, while it was docked in the Port of New Orleans. When plaintiff slipped, he fell approximately fifty feet, landing on his head on the concrete piers of the dock. He was unconscious for approximately three months and suffers from residual deafness in one ear, partial paralysis in one leg, partial paralysis in one arm, and brain

damage which affects his memory, intelligence, and personality. Plaintiff alleges that he slipped from the M/V SUCRE in oil located on top of a twenty foot container located on that vessel just beneath one of the vessel's cranes. Plaintiff further alleges that this ship's crane leaked oil (Stettinius deposition, pages 81 and 82); and that the oil was on the container when the M/V SUCRE arrived in the Port of New Orleans (Falgoust deposition, page 25; Booker deposition, page 29; Harang deposition, page 21). Plaintiff contends that the existence of oil on top of a container in an area where the vessel knew stevedores would have to work is a breach of the vessel's duty owned to stevedores to provide a reasonably safe place to work. Plaintiff further contends that this defect was hidden in that it was located on the top of a container which had other containers located on top of it and that the vessel failed to warn plaintiff and his fellow stevedores of this defect. Plaintiff further contends that this is a hazard under the control of the ship, in that the ship's own crane created the hazard. Lastly, plaintiff contends that the M/V SUCRE had knowledge of the oily container top (or was charged with such knowledge) and that it further had knowledge that stevedoring operations with regard to this container were nevertheless being

conducted by plaintiff's employer and that the vessel should have intervened.

As will appear from plaintiff's response to the defendant's statement of allegedly uncontested material facts, most of the facts material to this case are contested by the parties. The defendants' motion should therefore be denied on that basis. Additionally, plaintiff submits that the law does not support the granting of defendants' motion.

The party seeking Summary Judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Here, the defendant claims that the oil substance on which plaintiff slipped came from a dock side source. Plaintiff and all of his co-workers claim that the oil substance was on the container in question when the M/V SUCRE arrived in the Port of New Orleans.

The United States Supreme Court has held that, before turning over the vessel to a stevedore, a shipowner must exercise due care to insure that the ship and its equipment are in such a condition that an experienced stevedore will be able by the exercise of reasonable care to carry on its operations with reasonable safety to persons and property. Even after

stevedoring operations have begun, the vessel owner has a duty to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore, in the exercise of obviously improvident judgment, intends to continue work in spite of that condition. Scindia Steam Navigation Co. v. de los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed. 2d 1 (1981).

"Vessel owner liability may arise: (1) if the vessel owner fails to warn on turning over the ship of hidden defects of which he should have known; or (2) for injury caused by hazards under the control of the ship; or (3) if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and therefore cannot be relied on to remedy it." Masinter v. Tenneco Oil Co., 867 F.2d 892 (5th Cir. 1989) The obviousness of a danger, although relevant to the first exception listed above, bears no significance to a vessel owner's duty caused by hazards under the control of the ship, which is exception no. 2, above. Masinter, Supra.

A shipowner has no defense that a hazard was open and obvious. Stassi v. American Commercial Lines, Inc., 720 F.2d 879 (5th Cir. 1983); 56 Tul. L. Rev. 1421 (1982); Treadaway v. Societie Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990).

Maintenance and repair of a ship's winch (or crane) is the sole responsibility of the ship's crew. Where a longshoreman is injured as a result of defective ship's equipment, a reasonable jury could find that the ship should stop loading operations until the winch (or crane) could be made safe. There are circumstances in which a shipowner has a duty to act where the danger to longshoremen arises from malfunctioning of the ship's gear being used in cargo operations. Viator v. Hellenic Lines, 558 F. Supp. 700 (E.D. Tx. 1983).

Where water and oil existed in a work area when the longshoremen first board a vessel, a jury may find that a vessel owner breached its duty that it owed to the longshoremen to provide a reasonably safe place to work even if the accumulation of water and oil was visible and thus known to the longshoremen. Treadaway, Supra.

If a condition exists from the outset, the shipowner is charged with actual

knowledge of the dangerous condition. Hernandez v. M/V RAJAAN, 841 F.2d 852 (5th Cir., 1988). Where a vessel owner, through its actions and failures to act, sets the stage for an accident, even if that event required the negligence of a stevedore to appear on the scene before it could occur, the allocation of the stevedore's fault to the vessel owner is reasonable. Woods v. Sammisa Co., Ltd., 873 F.2d 842 (5th Cir. 1989).

Even if a stevedore or its employees were negligent and that negligence was a proximate cause of the plaintiff's injury, only if a reasonable jury could reach no other conclusion but that the stevedore's negligence was the sole cause of the injury, should Summary Judgment be granted in favor of the vessel owner. Gay v. Barge 266, 915 F.2d 1007 (5th Cir. 1990).

Here, there are many facts in dispute. For this, and the aforementioned reasons, plaintiffs submit that the defendants' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 20 day of Aug., 1991.

/s/ Harold M. Wheelahan, III
Harold M. Wheelahan, III

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/ and CRAYTON K. TURNER	CIVIL ACTION NO. 90-0727 SECTION "J"
VERSUS	
OCEAN NYMPH SHIPPING CO., LTD. and COLUMBIA SHIPMANAGEMENT	Judge Carr Magistrate Wynne Judge Carr

* * * * * * * * * * * * * * * * * * * *

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF ALLEGEDLY UNCONTESTED MATERIAL FACTS

NOW INTO COURT, through undersigned counsel, come plaintiffs, Donna Tillman Turner, wife of and Crayton Turner, who respond to the Statement of Allegedly Uncontested Material Facts submitted by defendants, Ocean Nymph Shipping Co., Ltd. and Columbia Shipmanagement, Ltd., as follows:

I.

Plaintiffs admit the allegations of Paragraph I.

II.

Plaintiffs admit the allegations of Paragraph II.

III.

Plaintiffs admit the allegations of Paragraph III.

IV.

Plaintiffs admit the allegations of Paragraph IV.

V.

Plaintiffs admit the allegations of Paragraph V.

VI.

Plaintiffs specifically deny that Edward Stettinius inspected the M/V SUCRE prior to Coastal Cargo beginning cargo operations. In his deposition, Mr. Stettinius testified: "Question: What did you do aboard the vessel? Answer: I got stowage informage with the port captain and the chief mate and proceeded to discharge the vessel." (Page 74)

VII.

The allegations of Paragraph VII are admitted insofar as they state that Coastal Cargo's pre-cargo operations inspected policy does not require inspection

of the tops of containers aboard the vessels. Stettinius testified "you have containers stacked on top of one another and its not possible in those cases." (Page 60).

VIII.

The allegations of Paragraph VIII are denied as stated, because Stettinius testified that it was impossible to inspect parts of the vessel that the Coastal Crew would need to deal with such as the tops of containers that had other containers stacked on top of them. (Page 60).

IX.

The allegations in Paragraph IX are denied as stated. It is admitted that Stettinius did not make a complaint to the crew of the M/V SUCRE regarding the condition of the vessel or its gear on 21 January 1990.

X.

The allegations of Paragraph X are denied as stated. It is admitted that Stettinius made no complaint to the crew of the M/V SUCRE regarding oil on the tops of any containers until the day after the accident. (Stettinius deposition, at pages 155 and 156).

XI.

The allegations of Paragraph XI are denied insofar as they categorize plaintiff's stepping from one container to another as a jump. It is not necessary to jump from one container to another. (Harang deposition, page 29; Crayton Turner deposition, pages 63 and 64.)

XII.

It is admitted that both Falgoust and Harang have testified that they could easily see what was variously categorized as "oil" or "grease" on top of the container. Falgoust and Harang both testified that they dealt with this container during the day time. Whether other longshoremen could see the slippery substance on the container later that night at the time of Turner's accident is purely speculative. The allegations of Paragraph XII are therefore denied.

XIII.

The allegations of Paragraph XIII are denied as written. It is admitted that Booker and Falgoust noticed the oily substance during day light hours and spoke to their immediate co-workers about it. All other allegations of Paragraph XIII are denied. (Falgoust deposition, page 28).

XIV.

The allegations of Paragraph XIV are denied as stated. The Coastal Cargo workers were unaware of any such policy.

XV.

The allegations of Paragraph XV are denied as written. It is admitted that sawdust is kept in the warehouse which is sometimes spread on slippery substances.

XVI.

The allegations of Paragraph XVI as written. The context of the plaintiff's testimony is that if he could step between containers he felt it was safe. He did not feel it was safe to jump between containers. It was not necessary to jump from number 2 to the forty footers. (Harang deposition, page. 29).

XVII.

The allegations of Paragraph XVII are denied. Recorded testimony simply states that Booker, a Coastal worker, had been warned not to jump from container to container.

XVIII.

The allegations of Paragraph XVIII are denied. The

quoted testimony is that the crew was re-rigging the ship's crane to load different types of containers.

XIV.

The allegations of Paragraph XIV are denied. The M/V SUCRE's cranes consistently leaked oil and the twenty foot container in question was stowed right below the crane. (Deposition, Edward Stettinius, pages 81 and 82).

XX.

The allegations of Paragraph XX are denied. The top end loader was not used to load the twenty foot container and therefore could not have leaked oil on the twenty foot container. (Harang deposition, page 28).

XXI.

The allegations of Paragraph XXI are denied as written in that Coastal Cargo's policy and its means of dissemination are in dispute. (Harang deposition, page 31).

XXII.

The allegations of Paragraph XXII are denied in that at least some of the Coastal employees had never been told that this was company policy. (Falgoust deposition, page 22).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorney(s) this 20 day of Aug., 1991.

/s/ Harold M. Wheelahan, III
Harold M. Wheelahan, III

APPENDIX J

VERBATIM TEST OF 33 U.S.C. §905(b)

"NEGLIGENCE OF VESSEL:

In the event of injury of a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such

person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX K

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/ and CRAYTON K. TURNER	CIVIL ACTION
	NO. 90-0727
Plaintiffs,	SECTION "J"
VS.	MAG. DIV. 3

OCEAN NYMPH SHIPPING CO., LTD AND COLUMBIA SHIPMANAGEMENT, LIMITED,

Defendants

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This action arises under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b), as a result of an injury to Crayton K. Turner on January 21, 1990. The accident occurred aboard the M/V SUCRE, and the plaintiffs, Donna and Crayton Turner, brought suit against Ocean Nymph Shipping Co., Ltd., the operator of the M/V SUCRE, and Columbia Shipmanagement,

Limited, the owner of the M/V SUCRE. CIGNA Insurance Companies (CIGNA) filed a Petition for Intervention in the above-captioned matter to protect its compensation *lien in the event that the* plaintiffs recover in this suit. Trial of this matter is scheduled to begin on September 23, 1991.

The defendants, Ocean Nymph and Columbia have moved for Summary Judgment dismissing the plaintiffs' complaint against them on the grounds that no genuine issue of material fact exists and that they are entitled to Summary Judgment as a matter of law. CIGNA respectfully submits that issues of material fact do exist and that the defendants' Motion for Summary Judgment is therefore inappropriate. Accordingly, CIGNA respectfully requests that the Court deny the defendants' Motion for Summary Judgment.

FACTS

On January 21, 1990, the plaintiff, Crayton K. Turner, was inured as the result of an accident aboard the M/V SUCRE, a vessel owned, operated, and controlled by Ocean Nymph Shipping Company, Ltd., and/or Columbia Shipmanagement, Limited. Mr. Turner, a stevedore employed to perform work aboard the M/V SUCRE. He was allegedly injured when he slipped in a foreign substance on a cargo container on

the vessel. He then fell approximately fifty feet from the top of the container on the deck of the M/V SUCRE to a cement piling which supported the dock. As consequence of Mr. Turner's alleged injuries, CIGNA, the workers' compensation insurer for Coastal Cargo Company has paid compensation and medical benefits to Mr. Turner.

The defendants contend that the oil in which Mr. Turner slipped was not present on the cargo container when off-loading began. However, testimony from other stevedores present at the time of the accident refute that contention. Therefore, a material issue of fact is in dispute, and Summary Judgment is inappropriate.

LAW AND ARGUMENT

Summary Judgment is appropriate and may be granted when the moving party establishes the right to judgment "with such clarity that the non-moving party cannot recover under any discernible circumstance." Jones v. Western Geophysical Co. of America, 669 F.2d 280, 283 (5th Cir. 1982). Furthermore, all evidence must be viewed in a light most favorable to the non-moving party. Id. Rule 56 of the Federal Rules of Civil Procedure provide that Summary Judgment may be granted only when the entire record, including depositions, shows that no genuine issues of material fact

exist. "The mover must bear the burden of proof, and 'all reasonable doubts as to the existence of the genuine issue of material fact' have to be resolved against him." Jones, 669 F.2d at 283 (citing, Erco Industries, Ltd. v. Seaboard Coast Line Railroad Company, 644 F.2d 424, 428 (5th Cir. 1981)). The Jones court further noted that the trial court should not decide factual issues, but only determine whether issues of fact exist. Id. (See also, First Nat'l Bank of Columbus, Columbus, Georgia v. Pelican Homestead and Sav. Assoc., 869 F.2d 896, 898 (5th Cir. 1989)).

The defendants initially claimed that the oil on top of the twenty foot container was not present at the commencement of the unloading operations. See Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 6-7. However, depositions from longshoremen witnesses controvert the defendants' contention. An issue of fact exists as to whether the oil on top of the twenty foot cargo container from which the plaintiff slipped was present before off-loading operations began. See Booker Deposition at p. 29, lines 4-13 (attached Exhibit "A"); Falgoust Deposition, p. 24, lines 23-25 and p. 25, lines 1-6 (attached Exhibit "B"); Harang Deposition, p. 20, lines 2-12 and attached Statement,

pp. 3-4 (attached Exhibit "C"). The question of when and how the oil appeared on top of the twenty foot cargo container is evidence of a genuine issue of material fact which renders Summary Judgment inappropriate. Therefore, this Honorable Court should deny the defendants' Motion for Summary Judgment. The defendants also claim that the origin and time that the oil appeared on the cargo container is irrelevant and that they are entitled to judgment as a matter of law. CIGNA respectfully submits that the defendants are not entitled to summary judgment as a matter of law because the existence of oil on the container raises an issue of vessel negligence which cannot be decided in a summary proceeding.

The issue of vessel negligence is usually a question of fact for the jury. Randolph v. Laeisz, 896 F.2d 964, 971 (5th Cir. 1990). In Randolph, the court reviewed the duties that a vessel owner owes to longshore workers under Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614 (1981).

> Two general tenets underlie the distribution of these duties: first, as a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards;

> second, the vessel owes the stevedore and his longshoremen employees the duty of exercising due care under the circumstances.

Randolph, 896 F.2d at 970.

The Randolph court also noted the vessel duties delineated under Scindia: (1) the vessel owner must warn the stevedore and longshoremen of hidden defects of which he, the vessel owner, should have known; (2) the vessel owner is responsible for injury caused by hazards under the control of the ship; and (3) the vessel owner is liable for injury resulting from a failure to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition and that the stevedore is exercising "obviously improvident" judgment and cannot be relied upon to remedy the hazard. Randolph, 896 F.2d at 970 (citing, Masinter v. Tenneco Oi Co., 867 F.2d 892 (5th Cir. 1989).

In Randolph, the court held that summary judgment was inappropriate when disputed questions of fact existed regarding whether a slightly damaged gangway created an "unreasonable risk of harm and if the stevedore's decision to continue to use the gangway was so 'obviously improvident' as to

trigger the vessel duty to intervene." Id. at 971.

In Treadway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990), the court discussed a vessel's duty to exercise ordinary care and to warn of defects before operations commenced. The plaintiff, Treadway, argued that Louis-Dreyfus was negligent in failing to detect and eliminate water and oil in an area traversed by longshoremen. Id. at 165. The court concluded that although Louis-Dreyfus breached its duty to exercise ordinary care to provide a reasonably safe place to work, the ship owner was not liable unless the plaintiff could establish that

(1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or

(2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.

Id. at 166.

The court determined that the jury's decision that water and oil were present at the beginning of the longshoring operations

was reasonable despite some conflicting evidence presented by the parties. Id. at 166. Moreover, the court concluded that the plaintiff's knowledge of the dangerous condition or its obviousness did not preclude the plaintiff's recovery. Id. at 167.

In the instant case, in addition to the unresolved issue of fact regarding the origin of the oil and the time at which the oil appeared on the cargo container, the issue of the scope and extent of vessel negligence is in dispute. Because the question of negligence is generally a question of fact for the jury, Summary Judgment is inappropriate.

Therefore, CIGNA respectfully requests that this Honorable Court deny the defendants' Motion for Summary Judgment on the grounds that genuine issues of material fact exist and that the defendants are not entitled to Summary Judgment as a matter of law.

Respectfully submitted,

/s/ Kathleen K. Charvet
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading on all counsel of record in these proceedings by depositing same in the U.S. Mail, postage pre-paid, to their proper addresses on this 21st day of August, 1991.

/s/ Kathleen K. Charvet

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DONNA TILLMAN TURNER, wife of/ and CRAYTON K. TURNER Plaintiffs,	CIVIL ACTION NO. 90-0727 SECTION "J"
VS.	MAG. DIV. 3
OCEAN NYMPH SHIPPING CO., LTD AND COLUMBIA SHIPMANAGEMENT, LIMITED, Defendants.	

STATEMENT OF CONTESTED MATERIAL FACTS

1. The foreign substance on top of the twenty foot container was present at the commencement of the unloading operations aboard the M/V SUCRE on January 21, 1990.

2. The oil on top of the twenty foot cargo container which caused Mr. Turner to slip and injure himself originated on the M/V SUCRE.

3. The M/V SUCRE failed to correct a dangerous condition

aboard the vessel before off-loading operations began.

Respectfully submitted,

/s/ Kathleen K. Charvet
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing pleading on all counsel of record in these proceedings by depositing same in the U.S. Mail, postage pre-paid, to their proper addresses on this 21st day of August, 1991.

/s/ Kathleen K. Charvet